NO. 49475-2-II

COURT OF APPEALS
DIVISION II

IN THE STATE OF WASHINGTON

BRANDON FOSTER,
APPELLANT/PLAINTIFF

v.

FRITO LAY, INC.,
RESPONDENT/DEFENDANT.

REPLY BRIEF OF APPELLANT

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1. Where the unchallenged evidence proves an injured worker has physical restrictions relevant to jobs he is otherwise capable of performing, labor market evidence is a necessary element of proof of employability.

At the heart of this appeal is a disagreement of the necessity of vocational testimony to prove employability. More narrowly, Mr. Foster asserts that evidence of a positive labor market is an essential element of Frito Lay's burden of proving Mr. Foster is employable. Frito Lay argues the "general employability" standard does not require labor market evidence. (Respondent's Brief p. 23-4). It does.

The Court of Appeals in *Graham v. Weyerhaeuser*, 71 Wn. App. 55, 60-1 (1993) wrote:

> Whether work is general or special depends on whether it is generally available on the competitive labor market. General work is work, including light or sedentary work, *Spring v. Department of Labor & Indus.*, 96 Wn.2d 914, 919, 920, 640 P.2d 1 (1982); *Kuhnle*, 12 Wn.2d at 199, that is reasonably continuous, *Kuhnle*, 12 Wn.2d at 197 (citing *Green v. Schmahl*, 278 N.W. 157 (Minn. 1938)); *Allen v. Department of Labor & Indus.*, 16 Wn. App. 692, 694, 559 P.2d 572 (1977); *Fochtman v. Department of Labor & Indus.*, 7 Wn. App. 286, 292, 294, 298, 499 P.2d 255 (1972); *Nash v. Department of Labor & Indus.*, 1 Wn. App. 705, 709, 462 P.2d 988 (1969), within the range of the worker's capabilities, training, education and experience, *Allen v. Department of Labor & Indus.*, 30 Wn. App. 693, 698, 638 P.2d 104 (1981); *Fochtman*, 7 Wn. App. at 295, 298; *Nash*, 1 Wn. App. at 709, and generally available on the competitive labor market. *Spring*, 96 Wn.2d at 918 (competitive labor market); *Allen*, 30 Wn. App. at 699 ("recognized branch of the labor market") (quoting *Fochtman*); *Allen*, 16 Wn. App. at 693 ("reasonably stable market") (quoting *Lee v. Minneapolis St. Ry.*, 41 N.W.2d 433 (Minn. 1950)); *Buell*, 14 Wn. App. at 746 ("labor market"); *Fochtman*, 7 Wn. App. at 294 ("any well-known branch of

> the labor market"); *Fochtman*, at 298 ("competitive work market"). Special work is work, including light or sedentary work, *Spring*, 96 Wn.2d at 920, not generally available on the competitive labor market. *Wendt v. Department of Labor & Indus.*, 18 Wn. App. 674, 681, 571 P.2d 229 (1977); *Allen*, 16 Wn. App. 693, 694; *Buell*, 14 Wn. App. at 745; *Nash*, 1 Wn. App. at 709.

The *Graham* Court's analysis of the distinction between general and odd lot employability was based upon an exhaustive recitation of established precedent. With the numerous citations removed, the same passage reads:

> Whether work is general or special depends on whether it is generally available on the competitive labor market. General work is work, including light or sedentary work that is reasonably continuous within the range of the worker's capabilities, training, education and experience and generally available on the competitive labor market. Special work is work, including light or sedentary work, not generally available on the competitive labor market.

Id. (emphasis added).

Mr. Foster has the transferable skills for warehouse work. When viewed in a light most favorable to Frito Lay, he has physical work restrictions of uncorrected vision and diminished depth perception. What we do not know, because the record is silent, is whether Mr. Foster can obtain work in his competitive labor market with those physical restrictions.

The *Graham* Court clearly required labor market evidence to prove employability. General availability is not synonymous to assume these jobs exist. There must be evidence these warehouse jobs are generally available, to Mr. Foster with his permanent restrictions, on the competitive labor market. *Spring v. Dep't of Labor & Indus.*, 96 Wn.2d 914, 918 (1982) (competitive labor market); *Allen v. Dep't of Labor & Indus.*, 30 Wn. App.

693, 699 (1982) ("recognized branch of the labor market") (quoting *Fochtman v. Department of Labor & Indus.*, 7 Wn. App. 286 (1972)); *Allen*, 16 Wn. App. at 693 ("reasonably stable market") (quoting *Lee v. Minneapolis St. Ry.*, 41 N.W.2d 433 (Minn. 1950)); *Buell v. Aetna*, 14 Wn. App. 742, 746 (1976) ("labor market evidence is necessary"); *Fochtman*, 7 Wn. App. at 294 ("any well-known branch of the labor market"); *Fochtman*, at 298 ("competitive work market"). It is never appropriate to ask the trier of fact to make assumptions ("surely someone would hire Mr. Foster") in the absence of evidence.

The jury was erroneously tasked with speculating whether Mr. Foster's competitive labor market would hire someone with uncorrected vision and diminished depth perception. It was asked to decide, without evidence, whether these jobs were generally available. This error is reversible and the Court should order entry of judgment in favor of Mr. Foster.

A year after *Graham*, our Supreme Court issued its decision in *Leeper v. Dep't of Labor & Indus.*, 123 Wn.2d 803 (1994). Respondents argue the *Leeper* decision does not require evidence of inability to obtain work to support an employability finding. (Respondent's Brief pp. 27-29). It asserts that it is merely one factor among many and is not a necessary element. (Respondent's Brief p. 28-9). It further asserts that a jury could reasonably disregard vocational testimony, so long as the basis for that testimony "is substantially flawed." (Respondent's Brief p. 29). Presumably, Frito Lay is referring to its attack on Mr. Foster's credibility.

Mr. Foster asserts specific labor market evidence is necessary for Frito Lay to prove he was employable, also relying upon the *Leeper* decision, *inter alia*. The *Leeper* Court conducted a survey of relevant precedent, after which it wrote:

> We draw three general conclusions from these cases. First, the purpose of workers' compensation *and the principle which animates it*, is to insure against the loss of wage earning capacity. Adherence to this principle focuses disability hearings on the particular claimant's ability to work in the competitive labor market.
>
> Second, the appropriate measure of disability requires a study of the whole person – weaknesses and strengths, age, education, training and experience, reaction to the injury, loss of function, and other factors relevant to whether the worker is, as a result of the injury, disqualified from employment generally available in the labor market. The trier of fact must determine from all relevant evidence whether an injury has left the worker totally disabled.
>
> Third, our opinions require a claimant to show the workplace injury, not fluctuations in the labor market alone, caused the inability to obtain work. If the claimant shows the injury in some part caused the inability to obtain work, then the failure to obtain work is relevant evidence of total disability. Proof of this causality comes not only from the circumstances of the claimant's attempts to seek employment, but also from the reasonable inferences arising from the medical and vocational evidence.

Leeper, 123 Wn.2d at 814-15 (citations omitted; emphasis in original).

What the *Leeper* Court is requiring is proof that Mr. Foster's wage earning capacity has been restored following his injury. If he has no claim-related restrictions, then his wage-earning capacity has been restored. But Mr. Foster has permanent, injury-caused restrictions.

Respondent argues, at pages 25 to 26, that it was appropriate for the jury to conclude Mr. Foster has no work restrictions whatsoever, based upon the surveillance evidence. If true, this would negate the need to present labor market evidence. WAC 296-19A-010(1)(c).

However, Respondent is essentially arguing jury nullification because the trial court found, as a matter of law, that Mr. Foster did have physical restrictions caused by his industrial injury. (CP p. 88). The jury was specifically instructed the Board was wrong when it concluded Mr. Foster had no physical restrictions. Frito Lay has not challenged this factual finding. It is a verity. Further, Mr. Foster's credibility has no bearing on whether there are sufficient employers hiring warehouse workers with uncorrected vision and impaired depth perception.

Leeper then requires an examination of the injured worker's transferable skills, based upon a whole-person analysis. Admittedly, Mr. Foster possesses sufficient transferable skills to perform work in a warehouse. This case rests upon the third paragraph from *Leeper* quoted above.

Mr. Foster has uncorrected vision and diminished depth perception. According to the exhibits, these are essential requirements of warehouse work. Frito Lay must then present evidence, under the third prong of *Leeper*, that Mr. Foster can obtain work in his labor market. There must be some evidence of that labor market so the jury can draw "reasonable inferences arising from the medical and vocational evidence." *Leeper* at 815. No jury can draw a reasonable inference from silence.

Mr. Foster presented evidence, through expert medical opinion, that looking for work would have been futile because he was not physically capable of performing full-time work. Frito Lay presented medical and lay evidence that he was physically capable, albeit with restrictions, of performing full-time work. The trial court found, as a matter of law, that Mr. Foster had some physical work restrictions regarding his eyesight, even when viewing this evidence in a light most favorable to Frito Lay.

Mr. Martin's vocational testimony and the job analysis exhibits show these jobs require corrected vision and unimpaired depth perception. This evidence is unrebutted in the record. Frito Lay's medical experts testified Mr. Foster's vision is not fully corrected and his depth perception is impaired. This is sufficient evidence that this injury effects Mr. Foster's ability to obtain work: his residual physical abilities do not 100% match the vision requirements of these jobs. This creates a reasonable inference that Mr. Foster can only obtain these jobs if potential employers can accommodate his restrictions.

This record is silent on whether there are any employers, let alone a sufficient number, who would hire someone like Mr. Foster. WAC 296-19A-140(1)(f). The record is silent whether or not these job analyses match jobs as they exist in the actual labor market. WAC 296-19A-140(2)(c). The record is silent whether these jobs in the actual labor market, on an entry-level basis, match Mr. Foster's job at injury work pattern. WAC 296-19A-140(1)(e); WAC 296-19A-140(2)(e). We do not know the number of positions per job title. WAC 296-19A-140(2)(f). We do not know the

number of positions per title. WAC 296-19A-140(2)(f). We do not know the date of the last hire. WAC 296-19A-140(2)(h). We do not know the number of current openings. WAC 296-19A-140(2)(i). None of this evidence is dependent on Mr. Foster's credibility.

What we do not know is whether there are sufficient employers who would still hire Mr. Foster or someone like him; that there are sufficient employers who would still employ someone in a warehouse who had uncorrected vision and impaired depth perception (20% whole person permanent impairment). All we do know about Mr. Foster's labor market is that without a Commercial Driver's License, he cannot work as a long-haul truck driver. We also know that pallet jack operator is not a job that actually exists in Mr. Foster's labor market.

We know that pallet jack operator is paired with driving a company vehicle. (CABR 11/6/14 Tr. p. 29). We do not have a job analysis detailing the physical demands of the driving part of this job. We do not have any medical opinion approving his ability to perform the driving duties on a full-time basis. We do not know whether sufficient employers would hire per WAC 296-19A-140. We do know that Mr. Martin testified it was unlikely employers would allow Mr. Foster to operate a company vehicle while suffering from double vision. (CABR 11/6/14 Tr. pp. 30-31). Submitting this job analysis to the jury, was reversible error by itself.

To prove Mr. Foster is employable under *Graham* and *Leeper*, there must be overlapping Venn diagrams. The first circle is Mr. Foster's work restrictions. The second circle are his transferable skills. The third circle is

Mr. Foster's labor market. All three are necessary to prove he is employable. Two out of three is insufficient. No reasonable inference, as required by *Leeper*, can be drawn from vocational evidence that such employers exist, because no such evidence was introduced into this record.

Again, Respondent asserts that vocational testimony or evidence is not necessary to prove an injured worker is able to obtain work despite the holdings in *Graham* and *Leeper*. (Respondent's Brief p. 29). Respondent's assertion creates the implication that RCW 51.32.095 is only binding on the Department, but does not apply to the Board or the Courts. Respondent cites to no decision in its argument. Yet the previously cited case law clearly requires evidence of an injured worker's labor market. *Graham, et al.* Furthermore, RCW 51.32.095(2)(a)-(h) requires evidence of employers willing to hire Mr. Foster as part of the return to work priority analysis.

No one else besides a vocational counselor is qualified to offer the expert opinion, per ER 702, on the state of Mr. Foster's labor market. It is possible that Frito Lay could have paraded a series of potential employer fact witnesses to testify they would hire someone like Mr. Foster. It did not. Again, this record is devoid of expert opinion or factual testimony of any employer's willingness and ability to hire someone like Mr. Foster.

It is not reasonable for the trier of fact to draw any inferences from this silence. An attempt to draw such inferences carries a different label: speculation. A verdict cannot be supported by speculation; it must be supported by evidence. *Guijosa v. Wal-Mart Stores*, 144 Wn.2d 907, 922 (2001).

Leeper, *Graham*, RCW 51.32.095, and WAC 296-19A all require the same thing: specific evidence of employers who will hire injured workers who have permanent work restrictions. This requirement is what "insures against the loss of wage earning capacity." *Leeper*, 123 Wash.2d at 814. The jury is not permitted to assume that some employer out there will hire someone, with uncorrected vision and diminished depth perception, to work in a warehouse. Frito Lay must still prove, with evidence as opposed to silence, these jobs are generally available.

Here the unchallenged decision by the trial court was: Mr. Foster has claim-related work restrictions. It was error for the trial court to then permit a jury to speculate if some employers would hire Mr. Foster, despite those restrictions. It was error because there is no expert vocational or factual evidence of such employers exists in this record. It was error because evidence of transferable skills is not the same as evidence of a positive labor market.

2. The burden of proving there is a sufficient labor market to return Mr. Foster's wage earning capacity rested with Frito Lay.

Respondent argues that it was Mr. Foster's burden to prove these various transferable skill positions are not generally available in Mr. Foster's labor market. (Respondent's Brief p. 23). Frito Lay further asserts, for the first time in these series of appeals, Mr. Foster failed to meet his *prima facie* case that he is permanently totally disabled. (Respondent's Brief p. 2). This argument fails because Frito Lay did not preserve this issue. It neither filed its own Motion for Summary Judgment nor moved for

a Directed Verdict on this issue when Mr. Foster rested. It did not seek interlocutory review by this Court after the trial court entered its order granting partial directed verdict against Frito Lay.

Frito Lay notes that Mr. Martin testified about Mr. Foster's transferable skills as evidence of Mr. Foster's failure to meet his burden of proof. Frito Lay skips over Dr. Wojciechowski's testimony disapproving every single job analysis as medically inappropriate. Herein lies Mr. Foster's *prima facie* case: if Dr. Wojciechowski was believed, then Mr. Foster is incapable of full-time employment. His transferable skills and labor market are no longer essential elements of Mr. Foster's burden of proof, because they are moot for someone not able to work in a full-time capacity.

This shifted the burden onto Frito Lay to prove Mr. Foster is employable. Frito Lay presented evidence of Mr. Fosters' ability to perform jobs, albeit with restrictions due to uncorrected vision and diminished depth perception. Frito Lay did not present evidence Mr. Foster could obtain work with these restrictions, based upon labor market evidence.

Frito Lay asserts Mr. Martin's testimony on transferable skills is sufficient evidence to prove a positive labor market. (Respondent's Brief pp. 2-3). Transferable skills are not synonymous for a positive labor market. In other words, just because Mr. Foster has the skills to perform these jobs, it does not mean employers will hire Mr. Foster and accommodate the work restrictions identified by Drs. Shults and Baer.

Transferable skills are the skills Mr. Foster has cultivated through his training, education, and experience. WAC 296-19A-010(7). The labor market is the relevant geographic area wherein there are employers who would hire Mr. Foster within his work restrictions. WAC 296-19A-010(5); WAC 296-19A-140. Vocational counselors are required to survey (contact) potential employers to verify they are hiring and would employ someone like the injured worker. WAC 296-19A-140. There is no evidence this occurred; there is no testimony about the information learned if it did happen.

As argued above, for a reasonable juror to conclude Mr. Foster is employable there must be evidence of a) Mr. Foster's permanent work restrictions (if any), b) Mr. Foster's transferable skills, and c) labor market evidence demonstrating sufficient number of employers willing to hire someone, like Mr. Foster, who has the same permanent work restrictions and transferable skills.

It was Frito Lay's obligation to present this labor market evidence; it did not. Therefore, no reasonable juror can conclude, without engaging in impermissible speculation, Mr. Foster was capable of obtaining employment.

Conversely, it was not and should not have been Mr. Foster's burden to prove the labor market would not restore his wage-earning capacity. It is not Mr. Foster's burden to prove a negative. *Dep't of Labor & Indus. v. Rowley*, 185 Wn.2d 186, 205 (2016) ("Common sense dictates that a worker should not be required to prove a negative . . . in order to obtain benefits

under the IIA."). Mr. Foster presented medical evidence he could not perform any work due to his eye injury. He met his affirmative burden of proof, shifting the burden to Frito Lay.

Frito Lay did not meet its shifted burden. While it presented medical evidence that Mr. Foster could perform these occupations, it presented no evidence of employers who would hire someone like Mr. Foster with the same physical restrictions. Frito Lay presented no evidence these restrictions could be accommodated in Mr. Foster's labor market.

It was necessary for Frito Lay to present both pieces of evidence, medical and labor market, since the transferable skills were conceded. Without presenting both pieces of evidence, it did not have sufficient evidence of employability to rebut Mr. Foster's *prima facie* case. Simply stated, Frito Lay proved (in a light most favorable) Mr. Foster could do the work, but did not prove where he would be able get the work.

Respondent also implies that specific labor market evidence is not necessary, merely "general" labor market availability. (Respondent's Brief pp. 25-26). Again, this is inviting the trier of fact to engage in rank speculation. Mr. Foster has asserted at every level the trier of fact cannot simply assume that "surely someone would hire himself." It is never appropriate to ask the trier of fact to make assumptions in the absence of evidence. We simply do not know if anyone would actually hire someone to work in a warehouse who has uncorrected vision and diminished depth perception.

Instead, an essential element of proof of employability, is to present evidence there are employers who would hire someone like the injured worker. The specific labor market is central to meeting that element of proof. *Leeper*, *Graham*, *et al.* It is essential to rebut evidence showing the worker is permanently totally disabled. This record is fatally silent on this essential element of proof. Its silence is and should be fatal to Frito Lay's case to prove Mr. Foster is, in fact, employable. Frito lay failed to prove Mr. Foster can perform and obtain employment in light of his uncorrected vision and diminished depth perception.

3. Mr. Foster's credibility is irrelevant to whether there are employers who would hire someone with his skills and physical restrictions.

Respondent asserts that Mr. Foster's arguments and opinions of its experts fail because he was not a credible witness. (Respondent's Brief pp. 3-4). However, Mr. Foster's Motion for Directed Verdict is not predicated on the evidence presented solely in his case-in-chief. It is well established the Court must view the evidence in a light most favorable to the non-moving party. The trial court did so and excluded several proposed jobs: the job at injury, forklift operator, and maintenance mechanic, based upon the evidence presented by Frito Lay. These exclusions were based, in part, on the opinions of Frito Lay's medical experts.

Frito Lay hopes to avoid a complete directed verdict against it by repeating the shibboleth: credibility. Its hope is misplaced. Frito Lay asks the Court to disregard Mr. Martin's testimony because of it. Mr. Martin's

transferable skills testimony was based upon the facts of Mr. Foster's work history and educational experiences to identify transferable skills. There is no evidence Mr. Foster misrepresented his resume.

Mr. Martin's testimony was based upon the medical restrictions identified by the medical experts in the case, without any attempt to favor one over the other. (CABR 11/6/2014 Tr. pp. 16-17). Mr. Foster's credibility does have a derivative effect through the medical restrictions, but does not directly undermine Mr. Martin's testimony and opinions on transferable skills. Even so, the trial court conclusively determined the Board was wrong when it decided Mr. Foster has no restrictions whatsoever caused by his industrial injury. This unchallenged finding renders Mr. Foster's credibility moot for purposes of this appeal.

Mr. Martin's testimony was based upon his knowledge of what it is like to work in warehouses, the ability to work as a long-haul truck driver without a valid Commercial Driver's License, and whether potential employers are likely to hire Mr. Foster as a pallet jack operator. Such testimony is based solely upon Mr. Martin's expertise, irrespective of Mr. Foster's credibility.

As argued above, proving employability requires three overlapping sets of evidence in a Venn Diagram: work restrictions, transferable skills, and labor market. Only the first circle, work restrictions, is dependent upon Mr. Foster's credibility. The second, transferable skills, could be subject to a credibility attack if there was evidence Mr. Foster was not truthful about his educational and work history; no such evidence was elicited.

The missing third circle, his labor market, is not dependent on Mr. Foster's credibility once there is a final determination that he has claim-related work restrictions. It is dependent on factual or vocational evidence, independent of the injured worker, that there are sufficient employers in Mr. Foster's labor market who would potentially hire him. Again, this record is silent, for reasons wholly unrelated to Mr. Foster's credibility.

Frito Lay also attacks Dr. Wojciechowski's opinions using the same shibboleth. Mr. Foster's Motion for Directed Verdict is predicated on the testimony of Drs. Shults and Baer. Both doctors assigned work restrictions to Mr. Foster for his claim-related double vision, despite also questioning his credibility. Stated differently, both doctors questioned the severity of his symptoms, but both agreed Mr. Foster has some restrictions associated with his injury. It was upon this evidence the trial court entered partial directed verdict in favor of Mr. Foster.

Frito Lay did not appeal nor challenge this partial directed verdict. The Court must accept the issues of fact decided in favor of Mr. Foster as verities on appeal. At its bare minimum, this means the Court must accept as true the following: 1) Mr. Foster has claim-related double vision; 2) his claim-related double vision is severe enough to prevent him from maintaining his Commercial Driver's License; 3) Mr. Foster cannot operate a forklift or work as a maintenance mechanic; and 4) Mr. Foster has uncorrected vision and impaired depth perception.

It is the fourth item that is at the center of this dispute. The Board found Mr. Foster has no restrictions related to his double-vision; yet the trial

court overturned that finding in granting partial directed verdict. This means as an undisturbed matter of fact and law Mr. Foster has injury-caused physical restrictions. On review of a directed verdict motion, the Court must formulate the degree or severity of those restrictions in a light most favorable to Frito Lay.

Frito Lay's attempt to hide behind its credibility shibboleth is an attempt to avoid the logical and legal implications of the fact Mr. Foster has claim-related physical restrictions. It wants the Court to think that a reasonable juror could conclude Mr. Foster has no restrictions whatsoever because of his alleged lack of credibility. This attack on Mr. Foster's credibility through the surveillance videos attempts to create the impression that he had no restrictions whatsoever. This attack is not relevant because the trial court found there are some physical restrictions.

Between Dr. Shults and Dr. Baer, Dr. Baer gave the least and lightest degree of work restrictions. Dr. Baer testified Mr. Foster was not capable of working a job requiring depth perception. (CABR Dep. Dr. Baer p. 35, ln. 8-9). Dr. Baer approved various transferable skill positions, despite the job descriptions requiring unimpaired depth perception and other visual demands. (CABR Dep. Dr. Baer pp. 27-28, 32-35). The mistake of the trial court was presupposing that a match between physical restrictions and having the training, education, and experience to perform various positions is sufficient to prove employability. It is not.

What is sufficient is having a match between physical restrictions, transferable skills, and Mr. Foster's labor market. Mr. Foster's credibility

has no bearing on the last essential element of proof. Frito Lay had the burden of proving this last essential element to rebut Mr. Foster's *prima facie* case. The silence in this record means Frito Lay failed to present legally cognizable evidence. The verdict should be reversed and a verdict entered in favor of Mr. Foster.

4. This Court can review the denial of Summary Judgment because Mr. Foster later moved for Directed Verdict.

Respondent asserts this Court cannot review Mr. Foster's appeal of the trial court's denial of his Motion for Summary Judgment, citing *Kaplan v. Northwestern Mut. Life Ins. Co.*, 115 Wn. App. 791, 799 (2003). *Kaplan* relies upon two cases, which in turn cite to *Johnson v. Rothstein*, 52 Wash. App. 303 (1988). The *Johnson* Court does provide that summary judgment motions are not reviewable after a full trial by citation to RAP 2.2. However, the *Johnson* Court does create an exception to this rule where "trial counsel . . . preserve the claimed error by a motion challenging the sufficiency of the evidence during trial or by a post-trial motion." 52 Wash. App. at 308.

This is exactly what happened here: Mr. Foster moved for a directed verdict in trial. As a practical matter, this Court's review of the trial Court's partial granting and partial denial of directed verdict, sweeps in the denial of Mr. Foster's summary judgment motion. In all practicality, the trial court's order granting partial directed verdict effectively modified its order denying summary judgment. Whether or not this Court can review the

denial of summary judgment may have academic import, but has no practical effect on the outcome of this appeal.

CONCLUSION

The remainder of Respondent's brief goes through its laundry list of credibility attacks on Mr. Foster. (Respondent's Brief pp. 29-41). This parade of horribles misses the point. Despite all of Dr. Shults' and Baer's concerns over Mr. Foster's credibility they still concluded: he has claim-related double vision. They still concluded he could not operate tractor-trailer rigs; they still concluded he cannot drive a forklift; they still concluded he had some physical restrictions caused by the industrial injury.

For purpose of directed verdict, Mr. Foster must accept as true the testimony of Dr. Baer, who gave the least amount of restrictions. This is not to say Dr. Baer's restrictions were minimal. They were sufficient to prevent Mr. Foster from returning to his job at injury. What the Court cannot accept as true is that Mr. Foster has no restrictions whatsoever.

Mr. Foster's credibility does not bear at all on the question of whether there are employers who would reinstate Mr. Foster's wage earning capacity, even and in despite of Dr. Baer's restrictions. Mr. Foster's credibility is irrelevant to whether there are sufficient potential employers who would hire him in light of Dr. Baer's restrictions. Frito Lay is hoping that by repeating, credibility, over and over again the Court will overlook the hole in the center of its burden of proof.

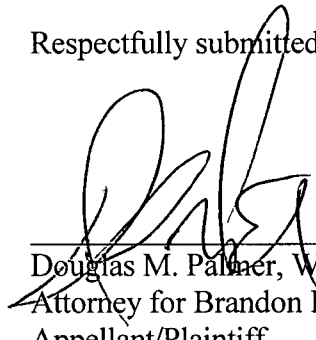
The trial court erred when it disregarded or overlooked this hole. The trial court erred when it permitted the jury to speculate that sufficient

employers exist who would hire Mr. Foster. The trial court erred when it denied Mr. Foster's Motion for Directed Verdict and, instead, only granted it in part.

This Court should reverse that error; it should reverse the decision of the Board of Industrial Insurance Appeals; it should order the Department of Labor & Industries to find Mr. Foster is a permanently totally disabled worker per RCW 51.32.060.

Dated: February 24, 2017.

Respectfully submitted,



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IN THE COURT OF APPEALS DIVISION II
OF THE STATE OF WASHINGTON

BRANDON FOSTER,	)	COA No. 49475-2-II
	)	
Appellant,	)	
	)	PROOF OF SERVICE
v.	)	
	)	
FRITO LAY, INC.,	)	
	)	
Respondent.	)	
	)	

The undersigned states that on February 24, 2017, I served via US Mail, as indicated below, Brief of Appellant, as attached, addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated: February 24, 2017.

Janelle Blevins, Legal Assistant
To Douglas M. Palmer
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